Supreme Court, U.S.
FILED
APR 20 2015
OFFICE OF THE CLERK

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CHICKEN COUNCIL (NCC) IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

NCC is a national organization whose members are involved in the U.S. poultry industry. NCC is committed to advocacy on behalf of its members in business, legislative, and judicial fora. Because of this commitment, NCC seeks to address issues germane to the poultry industry when such issues are presented to the U.S. Supreme Court.

Class and collective action litigation under State and Federal law for allegedly uncompensated fractional hours worked has, in recent decades, increased to levels unknown since the early days of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"), and is a matter of great concern for the poultry industry. Certification of classes consisting of putative members with widely varying claims to damages, or no claim at all; statistically unsound methodology enlisted for the proof of claims; and, in some cases, the denial of the opportunity to present defenses to liability or damages, denies employers their Constitutional right to due process and subjects them to protracted litigation. NCC therefore seeks leave to file this brief on behalf of Petitioner as *amicus curiae*.

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[1] Pursuant to Supreme Court Rule 37.6, NCC represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than NCC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for all parties received timely notice of *amicus curiae's* intent to file this brief and all parties have filed blanket consents with the Clerk of Court.

SUMMARY OF ARGUMENT

Using a few dozen samples to determine liability and back pay damages for a class of thousands of employees tramples individual class members' rights, as well as the employer's right to assert defenses that may vary as to the circumstances of individual employees. Class actions are supposed to be fair and efficient, but this is neither. In the case below, sampling and averages were submitted as the basis for a "reasonable inference" for the amount of uncompensated time, but the jury was skeptical and awarded the plaintiffs less than 44% of what they asked. Substantial numbers of employees included in the class had no injury, even when the proposed average number of additional minutes was added to their hours worked. Using statistically dubious sampling techniques in a class action to secure money damages for putative class members, many of whom suffered no wrong, is neither efficient nor fair, and contravenes this Court's recent decisions, which have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551-2552, 180 L.Ed.2d 374 (2011); *Comcast Corp. v. Behrend*, 569 U.S. ——, ——, 133 S.Ct. 1426, 1431-1432, 185 L.Ed.2d 515 (2013).

The sampling-and-averages methodology upheld by the court below results in some plaintiffs being shortchanged, while others reap a windfall. If an individual plaintiff went to trial on a claim for wages due under the FLSA, or a State wage act, the hours worked by any other employee would be irrelevant, because only the hours worked by that individual

before the Court would be pertinent to show liability and/or damages. But under the averaging procedures permitted by the court below, some individual class members benefitted while others were harmed, depending on how the hours they actually worked compared to the average hours worked by the workers sampled. This is contrary to *Dukes*, and the provision of the Rules Enabling Act (REA), 28 U.S.C. § 2072(b), which provides that procedural "rules shall not abridge, enlarge or modify any substantive right." Affording the recovery of money damages to an uninjured class member is plainly the enlargement of a substantive right under the FLSA, which rationally limits suits for back wages to those who performed work for which they were not properly compensated. Similarly, the averaging methodology condoned by the court below shortchanges employees who worked more than the average number of hours, restricting their rights, and abridges the right of employers to assert defenses to individual claims. Certiorari should be granted to clarify that the rules mean what they say and that class and collective actions do not allow a class to bypass the burden of proof its members would have to carry as individual litigants.

In a normal FLSA case for back wages, the employer may plead and prove affirmative defenses to liability and damages. This was denied the employer in the case below, where the Court allowed a lump-sum award based on sampling and averages, and denied the employer the opportunity to show that many class members worked no uncompensated overtime, either because all their donning and doffing occurred on the clock; because the supplemental "K-code" time paid equaled or exceeded the amount of time they spent donning and doffing; or because, even if the "average" time were added to their hours worked, they still

did not work overtime and were entitled to no back pay. Conversely, employees who actually worked more than the average would receive less than full relief. The opinion below even suggested that the employer lacked standing to raise these issues, or to complain about the allocation of damages. Indeed, implicit in the ruling below is that the class members also lack standing to complain about such misallocation, because averages were sufficient to support a reasonable inference, regardless of the merits (or lack thereof) of individual claims.

This erosion of defenses is of great concern to NCC members, and should alarm all employers, since it ties their hands, and could expose them to legalized extortion by the unprincipled assertion of class and collective claims. The Court should grant certiorari and examine the case below to determine whether class and collective actions are being misused to secure the award of damages to individuals who are entitled to no relief.

It also violates due process for money damages to be extracted from a defendant and distributed to putative plaintiffs who have suffered no injury and are not legally entitled to any recovery. The distribution of a lump-sum award to a class where some (not all) members are due back pay also offends the architecture of the FLSA, which was carefully designed to authorize back pay awards only to employees who actually performed work for which they were not paid the minimum wage or overtime compensation, requires employees to plead and prove the amount and extent of unpaid wages, and expressly limits other relief to liquidated damages equal to back pay, eschewing any other measure of compensatory damages. Awarding damages in arbitrary

amounts divorced from hours worked is an impermissible modification of the relief available under the FLSA and also violates the REA.

The Court should grant certiorari because in the case below, both employees and the employer were disserved by the class action vehicle. The "law of averages" does not apply in a case for back wages. As Judge Posner noted in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), if the average number of uncompensated overtime hours per class member per week were five, using that formula to award overtime to a class member who had only one hour of overtime brings about a windfall on him: conversely, awarding five hours of back pay to a class member who worked 10 hours of overtime would under compensate him by half. That is exactly what has happened here.

Under the scheme condoned by the court below, who has the right to complain about such potential or inherent unfairness? Not the employer: the court below ruled that it lacked standing to challenge the distribution of damages, even to parties to whom it had no liability. Not the employees who worked more than the "average" number of uncompensated hours as determined by the Court. The class members who receive a windfall would not complain, but should the Court condone awards to those who were not injured? Certiorari should be granted to hold that class representatives must satisfy all of the criteria of commonality under 29 U.S.C. § 216(b) and/or Rule 23, that back pay awards may not be based on averages that cheat some class members and unjustly enrich others, and that individuals who have suffered no injury may not be included in a class of plaintiffs seeking back pay.

ARGUMENT

A. Certifying Classes Based On Extrapolation From Samples Adversely Affects Both Parties' Substantive Rights And Is Inconsistent With Due Process, The Rules Enabling Act, And Prior Decisions Of This Court.

NCC's members are troubled by the use of non-representative samples to determine liability and damages for classes that can include thousands of employees. This tramples individual class members' rights to pay for all compensable hours worked, bestows windfalls on some while shortchanging others, and denies the employer the right to assert defenses that may vary as to the circumstances of individual employees. In the case below, the court erred in finding that the "sampling" supported a reasonable inference as to uncompensated fractional hours worked by the class members. The evidence showed that class members wore different combinations of personal protective equipment and, as a result, there was wide variation in the amount of time individual class members spent on donning and doffing-related activities. In addition, substantial numbers of employees included in the class admittedly suffered no injury: even when the proposed average number of additional minutes was added to their hours worked, they worked no overtime hours for which they were due to be compensated. The only "reasonable inference" that can be drawn from these proceedings is that no class member is likely to receive a just award fairly compensating them for hours actually worked.

The use of a class action[2] to secure money damages for putative class members who suffered no wrong is neither efficient nor fair, and contravenes this Court's recent decisions, which have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551-2552, 180 L.Ed.2d 374 (2011); *Comcast Corp. v. Behrend*, 569 U.S. ——, ——, 133 S.Ct. 1426, 1431-1432, 185 L.Ed.2d 515 (2013). Such awards dilute the relief owed to class members with meritorious claims. Where a class is represented by injured parties with a plausible claim to damages, but purports to include class members who have suffered no injury and are entitled to no damages, "typicality" cannot be satisfied and the matter should not proceed as a class action. The petition should be granted so lower courts will refrain from certifying classes that include members who have no just claim to relief.

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[2] The case below involved Federal claims under the FLSA and its opt-in collective action provisions, 29 U.S.C. § 216(b), as well as State law claims under Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq.*. However, as Judge Posner observes, "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences." *Espenscheid*, 705 F.3d at 770 (citations omitted). This brief will address the impact of Rule 23's criteria on both types of actions.

1. Class Members Who Have No Injury Lack "Commonality" With Injured Class Members.

"In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir.2013) (quoting *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir.1994)). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) also requires that the named plaintiffs be appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

Commonality is not satisfied merely by drafting a complaint that states a common fact: for example, in this case, the plaintiff workers were paid gang time. *See* Richard Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132 (2009), cited in *Dukes*, 131 S. Ct. at 2551. Rather, commonality requires the named plaintiff to demonstrate that the class members "have suffered the same injury," *Dukes* 131 S. Ct. at 2551, quoting

Falcon, 457 U.S. at 157, 102 S.Ct. 2364 (emphasis added). Yet in the case below, the District Court certified, and the Court of Appeals approved, a class that included individuals who suffered no injury. This was error. Rule 23 is not supposed to operate as a vacuum cleaner, indiscriminately sucking in members who have not been injured along with those who have.

2. The Court Below Erred In Failing To Decertify Or Redefine The Class So It Included Only Members With Common Injury.

The court below erred in finding that the plaintiffs did not have to show they all had suffered "*the same* injury," *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, at 798 n.5 (8th Cir. 2014) (emphasis added), and in allowing the jury to award a lump sum based on hypothetical "average" claims where there were widely varying actual claims asserted. The error lies in concluding that all class members do not have to suffer any injury. This is contrary to the very pillar of commonality. *See Dukes*, 131 S. Ct. 2551 ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.") (emphasis added.) There is no commonality where some class members had no injury and hence no standing to pursue a claim.

In *Dukes*, the Supreme Court expressed disapproval of "trial by formula," and held that "[c]ontrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay." 131 S. Ct. at 2560. The decision below does not live up to the standards

this Court set in *Dukes* because it allowed inference based on data collected from individuals who performed uncompensated activities to be generalized into awards for individuals who performed no uncompensated work. Certiorari should be granted and conformity to this Court's binding precedents required.

B. Including Uninjured Members In The Class Violates The Rules Enabling Act's Prohibition Against Abridgement, Enlargement, Or Modification Of Remedies.

Neither the FLSA collective action nor the Iowa Wage Payment Collection Law (IWPCL) Rule 23(b)(3) class action should have been certified, either as a matter of fact or a matter of law. *Dukes*, 131 S.Ct. at 2551. In *Dukes*, this Court rejected a procedure whereby "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.* at 2561. This is almost precisely the methodology upheld by the court below resulting in some plaintiffs being shortchanged, while others reaped a windfall. If an individual plaintiff went to trial on a claim for wages due under the FLSA or a State wage act, the hours worked by any other employee would be irrelevant, because only the hours worked by that individual before the court would be pertinent to show liability and/or damages.

An employee who sues for unpaid overtime "has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 [66 S.Ct.

1187, 90 L.Ed. 1515] (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub.L. No. 80-49, 61 Stat. 84. And, as Judge Beam points out in his dissent to the denial of rehearing *en banc*, "if an employee suffers no damages by way of unpaid wages, he or she is not a proper member of an alleged federal or state class and the employer has no liability for such a class claim asserted by an employee or his or her named plaintiff representatives." *Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed.Appx. 578, 579 (8th Cir. 2014), citing *Blades v. Monsanto Co.*, 400 F.3d 562, 571 (8th Cir.2005) ("[D]amages to all class members must be shown to justify the class action."). But under the class averaging procedures conducted by the court below, many class members were relieved from this duty. Some individual class members benefitted while others were harmed, depending on how the hours they actually worked compare to hours worked by the "samples" selected by the plaintiffs' experts. This is contrary to *Comcast*, and the provision of the REA, 28 U.S.C. § 2072(b), which provides that procedural "rules shall not abridge, enlarge or modify any substantive right."

Affording the recovery of money damages to an uninjured party is plainly the enlargement of a substantive right under the FLSA, which rationally limits suits for back wages to those who performed work for which they were not properly compensated. By the same token, the averaging methodology condoned by the court below definitely shortchanges employees who worked more than the average number of hours, restricting their rights, and abridges the right of employers to assert defenses to individual claims. Certiorari should be granted to clarify that the rules mean what they say, and that class and collective actions are not a shortcut that allows a

class to avoid the burdens of proof they would have to carry as individuals.

C. The Rules Enabling Act Is Violated When The Defendant Employer Is Denied The Right To Assert Defenses, And Standing To Object To The Award of Damages To Uninjured Class Members.

In a normal FLSA case for back wages, the employer may plead and prove affirmative defenses. This was denied the employer in the case below, where the court allowed a lump-sum award based on sampling and denied the employer the opportunity to show that many class members worked no uncompensated overtime, either because all their donning and doffing occurred on the clock; because the supplemental "K-code" time equaled or exceeded the amount of time they spent donning and doffing; or because, even if the "average" time were added to their hours worked, they still did not work overtime and were entitled to no back pay. The opinions below even suggested that the employer lacked standing to raise these issues, or to complain about the allocation of damages. Indeed, implicit in the rulings below is that the class members also lack standing to complain about such misallocation, because averages were sufficient to support a reasonable inference, regardless of the merits or lack thereof of individual claims.

Procedural rules cannot be used to abridge, enlarge, or modify any substantive right. 28 U.S.C. § 2072; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("[R]ules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting § 2072)). In *Dukes*, the Court held that "[b]ecause the Rules Enabling Act

forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); *see Ortiz v. Fibreboard Corp.*, 527 U.S., 815, 845, 119 S.Ct. 2295 (1999), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S.Ct. at 2561. Yet that is precisely what the court below did here.

1. Depriving A Defendant Of Individualized Defenses Violates Due Process.

It is axiomatic that the Due Process Clause, U.S. Const. amend. V is violated when a defendant is deprived of an opportunity to plead or prove defenses and liability is imposed without proof of fault. *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972) ("Due process requires that there be an opportunity to present every available defense,'" citing *American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231 (1932). *See also Nickey v. Mississippi*, 292 U.S. 393, 396, 54 S.Ct. 743, 744, 78 L.Ed. 1323 (1934). It is a denial of due process if the defendant is precluded from presenting such defenses at all, which is what the court below ruled.

This erosion of defenses is of great concern to NCC members, and should alarm all employers, since it ties their hands and could expose them to legalized extortion by the unprincipled assertion of class and collective claims. The Court should grant certiorari and examine the case below to determine whether class and collective actions are being misused to secure the award of damages to parties who would be entitled to no relief, except through a class action.

2. Defendants Have Standing To Challenge The Award Of Money Damages To Class Members.

It violates due process for money damages to be extracted from a defendant and distributed to putative plaintiffs who have suffered no injury and are not legally entitled to any recovery. The distribution of a lump-sum award to a class where some (not all) members are due back pay also offends the architecture of the FLSA, which was carefully designed to authorize back pay awards only as to employees who actually performed work for which they were not paid the minimum wage or overtime compensation, requires employees to plead and prove the amount and extent of unpaid wages, and expressly limits other relief to liquidated damages equal to back pay, eschewing any other measure of compensatory damages. Awarding damages in arbitrary amounts divorced from hours worked is an impermissible modification of the relief available under the FLSA and thus violates the REA.

This Court also has recognized that a defendant in a class action has a legitimate stake in the distribution of an award to ensure that all members are bound and that exposure is at an end. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804-05, 105 S.Ct. 2965 (1985) (defendant had "standing" to assert arguments concerning the "rights" and "interests" of class members in order to ensure "entire plaintiff class is bound"). In *Phillips* the Court found that the defendant had standing to protect its own interests, which could be adversely affected if some plaintiffs were not bound by a court's ruling because they received incomplete relief. *See also Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) (defendant has

"an interest in ensuring it pays only legitimate claims" because if payment of "inaccurate claims" causes some class members to "get less than full relief," those class members may claim they are not bound by the judgment). Given the mystery surrounding the distribution of the lump sum award as cut by the jury in the case below, it seems certain that some members of the plaintiff class will get less-than-full relief, while some will get a windfall at other class members' expense. The potential exposure to future liability is an adequate interest to vest Tyson with standing to dispute the allocation of the award.

D. Class/Collective Actions Should Be Efficient And Fair, But This One Is Neither.

The Court should grant certiorari because in the case below, both employees and the employer were disserved by the class action vehicle. The "law of averages" does not apply in a case for back wages. As Judge Posner noted in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), if the average number of uncompensated overtime hours per class member per week were five, using that formula to award overtime to a class member who had only one hour of overtime brings about a windfall on him: conversely, awarding five hours of back pay to a class member who worked 10 hours of overtime would under compensate him by half. That is exactly what has happened here. Yet under the scheme condoned by the court below, who has the right to complain about such potential or inherent unfairness? Not the employer: the court below ruled that it lacked standing to challenge the distribution of damages, even to parties to whom it had no liability. Not the employees: who worked more than the "average" number of uncompensated hours as determined by

the court. The class members who receive a windfall would not complain, but should the court condone a windfall to those who were not injured? The practical effect of this situation is to condone an essentially arbitrary distribution of the proceeds.

Espenscheid involved independent-contractor-type satellite technicians and installers who were paid under a piece-rate system. 705 F.3d at 772–73. The Seventh Circuit Court of Appeals affirmed the decertification in that case, finding that class certification would require thousands of evidentiary hearings. *Id.* at 773. Notably, the court observed that *Espenscheid* was not the type of case where "it appear[s] that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program, so that there is no need for notice . . , the district court can award that that relief without terminating the class action and leaving the class members to their own devices.'" *Id.* (quoting *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir.2012)).

The *Espenscheid* Court recognized that it was impossible to determine the amount of damages due absent class members from the class representatives' claims. "To extrapolate from the experience of the 42 [representatives] to that of the 2341 [class members] would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage." 705 F.3d at 774. But no such uniformity existed. As a result, inferring "the work time of thousands of workers" from the experiences of a few would produce systemic discrepancies in damages to absent class members. *Id.* at 774. Those who worked fewer unpaid or underpaid hours than the "average representative"

would receive a windfall, while those who worked more a shortfall. *Id.* at 775.

Espenscheid affirmed the decertification of a class asserting federal and state wage-and-hour claims. *Id.* at 777. Decertification was appropriate because the plaintiffs' trial plan did not present a feasible way of determining the plaintiffs' damages; instead, calculating damages would have "require[d] 2341 separate evidentiary hearings." *Id.* at 773. These individualized inquiries were required because the employees varied in how much they worked and how they recorded their time. *Id.* As the Seventh Circuit noted, "[I]t's not as if each [employee] worked from 8 a.m. to 5 p.m. and was forbidden to take a lunch break and so worked a 45–hour week (unless he missed one or more days because of illness or some other reason) but was paid no overtime." *Id.* If that had been the case, the Court reasoned, "each [employee's] damages could be computed effortlessly, mechanically, from the number of days he worked each week and his hourly wage." *Id.* But a formulaic calculation of damages was not possible in *Espencheid*, over 2,000 "separate hearings loomed," and class treatment was therefore not appropriate. *Id.* at 775.

But individualized damages questions did *not* automatically thwart class certification in *Espenscheid*. Instead, the Seventh Circuit identified other expeditious ways of calculating damages, even in scenarios where damages may be individualized. The problem for the *Espenscheid* plaintiffs, though, was that they rejected the proposals that the District Court offered and they failed to offer any feasible alternatives for calculating damages. *See id.* at 773-76 (rejecting plaintiffs' proposal of presenting testimony from forty-two "representative" members of the class because

class counsel could not explain how these "representatives" were chosen). That left the plaintiffs back in the position of having to reconstruct their unreported work time from memory, inferred from the particulars of the jobs the [employees] did, or estimated in other ways" unique to each employee. *Id.* at 775.

A class or collective action is not the sole avenue for relief for workers who believe they have worked hours for which they have not been fairly compensated. As Judge Posner and others have observed, employees can seek back pay through the Secretary of Labor. Under 29 U.S.C. § 216(c), the Secretary is authorized to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees." The Secretary need not seek certification of a class under Rule 23 or collect opt-ins as private litigants under 29 U.S.C. § 216(b). And—perhaps this is the most telling difference—the Secretary is not awarded attorneys' fees paid by the employer. A worker represented by the Secretary ordinarily will recover the full measure of back wages due to him or her, plus an equal amount in liquidated damages: not an "average" award based on the sampled experience of co-workers who may have greater or lesser claims. This option affords tailored relief shorn of many of the complications that plagued the case below. The Court should grant certiorari and consider whether this might not be a preferable means of making workers whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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